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IN THE

Supreme Court of the United States

..... TERM, 1967

NO. 709

JOHN J. PLISCO, Petitioner

v.

UNION RAILROAD COMPANY,
a corporation, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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JOHN J. PLISCO, Petitioner

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UNION RAILROAD COMPANY,
a corporation, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on June 15, 1967.

CITATIONS TO OPINIONS BELOW

The district court's opinions denying the grant of a new trial (R 310a)* and denying the grant of a new trial under Rule 60 (b) (2) (R 337a) are unreported.

*This and similar references are to the Appendix printed for use of the court below, and made a part of the record here.

The opinion denying the grant of a new trial is printed in Appendix B hereto at p. 11. The opinion denying the grant of a new trial under Rule 60 (b) (2) is printed in Appendix B hereto, at p. 16. The opinion of the Court of Appeals is reported at 379 F 2d 15. The opinion of the Court of Appeals is printed in Appendix B hereto, at p. 19.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1967. A timely petition for rehearing was denied on July 14, 1967. The Jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Where petitioner's rights accrue under the Federal Employers Liability Act and his newly discovered evidence under Rule 60 (b) (2) admittedly would probably change the trial result, should he be held to a higher standard of diligence in one circuit than he would be held to in other circuits?

FEDERAL RULE INVOLVED

The federal rule involved is printed in Appendix A, at p. 9 below.

STATEMENT OF CASE

Petitioners case was filed in the District Court on April 3, 1964. Jurisdiction arose by virtue of the fact that petitioner is an employee of respondent's railroad which is governed by the Federal Employers Liability Act.

Respondent has a service track on the property of the Continental Can Company. On December 12, 1962 one of defendant's engines derailed on the Continental Can track. (R 121a) The ground was covered with snow and ice and the temperature was twelve (12) degrees above zero (R 71a). The Petitioner was sent with his crew by station wagon to the scene to help rerail the engine (R 121a).

As Petitioner walked from the station wagon to the engine he slipped on ice and fell severely injuring himself. (R 50a) Interrogatories were filed by both sides. Respondent in answer to Petitioner's interrogatory calling for witnesses at the scene named Petitioner's crew members. (R 23a).

The case was tried on a theory developed through facts given by these crew members namely that Petitioner slipped and fell on a naturally formed icy condition.

The jury returned a verdict in favor of the Respondent. A motion was promptly filed and promptly denied. (R 307a).

The Respondent in a News Bulletin to its employees informed them that it had won the case. (R 375a). As a result of this Bulletin Plaintiff's counsel was con-

tacted by Petitioner's Union President and a witness heretofore unknown, Thomas Askey (R 356a). Mr. Askey gave an affidavit in which he explained that the icy condition previously thought to be natural in origin was actually artificially created by the work of two additional crews at the scene. This occurred when these crews were using flame throwers to melt the ice under the engine. The heat from the flame throwers melted the surrounding snow causing it to immediately refreeze into a glazed and icy condition. (R 376a).

A motion under Rule 60 (b) (2) asking for a hearing and new trial was then filed in the District Court. The motion was denied (R 320a-340a).

The Circuit Court affirmed in an opinion by Judge Hastie in which Judge Freedman joined. Judge McLaughlin dissented with opinion. A petition for rehearing was then denied by the Court with Judge McLaughlin dissenting.

REASONS FOR GRANTING THE WRIT

The investigation, the discovery, the witnesses and the evidence in the trial of this case all established that Petitioner fell on snow and ice naturally formed on the property of Respondent's client. The newly discovered evidence as investigated by both Petitioner and Respondent established that Petitioner fell on ice artificially created by the negligence of Respondent through his employees in rerailing an engine.

The District Court found that under the new evidence the issues would all remain the same and thus the evidence would be merely cumulative. It felt that with the new evidence a new jury would not reach a different result and it saw no reason to raise the question of lack of diligence.

The Court of Appeals found that the issues were in fact different and therefore the new evidence was not cumulative. *Plisco v. Union Railroad Company,* 379 F2d 15 (1967). It further agreed that another jury, with the new evidence before it, might reach a different result. However the Court of Appeals said the Petitioner failed to exercise diligence.

The question is whether or not the Circuit Court in its reasoning and citations has changed the burden of diligence from reasonable to extraordinary. It is Petitioner's position that they did increase the burden and further that a demand for extraordinary diligence is in contradiction to other Circuit Court opinions on the matter. This is particularly alarming in view of the fact that Petitioner is a railroader injured in the course of his employment and comes under the Federal Employers Liability Act.

Petitioner fell in an area of preexisting snow and ice. A comprehensive investigation revealed that respondent was aware of the condition for a number of hours and had failed to sand the ice, salt the ice, remove the ice or take any other safety precautions to protect its employees. Petitioner served interrogatories to secure the names of all witnesses at the scene. Respondent answered the interrogatories by providing the names of members of petitioner's crew. Respondent failed to name the members of two other crews at the scene operating the torches which caused the ice to form.

There is no question that Mr. Askey, the new witness, was at the scene and that petitioner might have known or should have known he was there. Petitioner was aware that Mr. Askeys crew was present but not aware they were witnesses. It appeared to the petitioner that the complete facts had been determined and that he had sufficient witnesses to prove those facts.

Carried to its ultimate conclusion the circuit court opinion says that everyone at a scene must be interrogated. It further says that petitioner cannot rely on what the scene appears to be or what defendant leads him to believe the scene was. Impliedly it says he must go beyond what a reasonable man might do and engage in extraordinary or extreme diligence to rule out all matters not apparent to him. This creates a standard and burden far beyond what is called for by our present case law.

The cases relied on by the circuit court are factually most remote from the instant case. *Brown v. Pennsylvania R.R. Co.*, 1960, 282 F 2d 522, cert. denied 365

U.S. 818, involved a fact that did not occur until after the trial (Railroad Employee-Plaintiff dismissed for medical reasons based on his own physicians testimony) which fact could not have been discovered before the trial. *Hartford Accident and Indemnity Co. v. Shaw,* 1959, 273 F2d 133, involved a failure to identify the true owner of a vehicle when the Motor Vehicle Bureau records were available before trial. *Fleet v. W. A. Alexander & Co.,* 1962, 302 F2d 321, cert. denied 371 U. S. 841, involved an attorney who failed to appreciate the legal significance of facts he had before him and attempted to use Rule 60 (b) (2) as a substitute for appeal.

The proper rule would seem to be that cited by the Eighth Circuit in *Edgar v. Finley,* 1963, 312 F 2d 533. In that case the trial court found the plaintiff lacked diligence in uncovering a missing witness and the circuit court overruled saying that where substantial justice was not done the plaintiff was not dilatory and a new trial should be granted.

The Fifth Circuit Court of Appeals in *Ferrell v. Trailmobile Inc.,* 1955, 223 F2d 697, holds with the principal that if the ends of justice are best served by granting a new trial it should be granted even though diligence was not used.

The Ninth Circuit Court of Appeals extends this reasoning in *Lavino v. Jamison,* 230 F2d 909 (1956). In that case a new trial is allowed under the rule so that a witness may clarify testimony of other witnesses despite the fact that the witness was available to both parties neither of whom called him.

In our case the name of the witness was known to respondent and they saw fit to withhold it from their

answers to interrogatories. Certainly justice has not been done in this case. Petitioner investigated his case and proceeded through his trial with reasonable diligence. To demand more of him burdens him with extraordinary diligence.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FEDERAL RULE INVOLVED

Rule 60.

RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court. As amended Dec. 27, 1946, eff. March 19, 1948.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or

it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in the rules or by an independent action. As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.

1949 AMENDMENT

The amendment effective October 20, 1949, substituted the reference to "Title 28, U.S.C., § 1655," in the next to the last sentence of subdivision (b), for the reference to "Section 57 of the Judicial Code, U.S.C., Title 28, § 118."

APPENDIX B

OPINIONS AND JUDGMENTS BELOW

OPINION OF THE DISTRICT COURT ON ORIGINAL MOTION FOR A NEW TRIAL

Opinion.

(Filed March 17, 1966.)

March 16, 1966.

WEBER, J.

In this F. E. L. A. action the jury returned a verdict for the defendant. The plaintiff has moved for a new trial on the grounds that the verdict was against the weight of the evidence. Plaintiff now also asks for relief from the verdict under the provisions of F. R. C. P. Rule 60(b) on the grounds that newly discovered evidence justifies a new trial.

As for the weight of the evidence, the Court believes that the case was fairly and fully tried by able counsel on both sides, and was properly submitted to a jury under instructions to which no exception was taken. The case presented a conflict in the evidence both as to negligence and contributory negligence and as to plaintiff's injuries. With respect to injuries the plaintiff continued his regular work after the accident but later had himself transferred from engineer to fireman because of difficulties in reaching his assigned post as engineer. He sought no medical treatment for over two and one-half years after the accident until he voluntarily entered St. Francis Hospital Rehabilitation Center for a period of twenty-five days. The medical

testimony established no objective physical or neurological symptoms. A psychiatrist testifying on behalf of plaintiff diagnosed his present condition as a "conversion reaction" akin to hysteria, while another psychiatrist testifying for the defendant concluded that there was no evidence of any organic disorder or functional disorder of the nervous system and no basis for designating this as a "conversion reaction." The testimony of a physiatrist or physical rehabilitation medical expert was that he accepted a tentative diagnosis of hysteria or "conversion reaction" and felt that a physical rehabilitation course of treatment might be advantageous to plaintiff even though the symptoms were mental. Then the jury was presented with conflicting medical evidence as to the nature and cause of plaintiff's complaints a matter peculiarly within the jury's province. Even if the jury had found defendant negligence it would have faced a serious problem of credibility on the issue of plaintiff's damages.

On the question of negligence the evidence showed that plaintiff and three other members of his crew were delivered by automobile to a point close to the location of their derailed locomotive. This area was a parking lot adjoining a factory served by defendant railroad. They had to walk a short distance variously estimated between thirty feet and one hundred fifty feet to board the locomotive. The locomotive was situated on a track at the bottom of a cut about four feet below the level of the surrounding area, the sides of which sloped for about seven feet up to the crest. The plaintiff and the three members of his crew testified as to the condition of the ground around this area. Heavy snow had fal-

len a few days before, the area had been partly plowed and the snow was trampled down and hardpacked. It was very cold. The snow was icy in places. While this was not the regular working place of plaintiff or his crew, they had been taken there by automobile to help in the efforts of getting the train back on its rails. The defendant railroad had been working at this task for sometime at this point but had taken no precautions with reference to making the area more safe for the approach of plaintiff and his crew members

The jury were properly charged as to the duty of the railroad to furnish a safe place to work even where this involved the property of another party. We think that the evidence in support of plaintiff's allegation of negligence of the railroad was fully presented to the jury under a proper charge and the jury could well conclude that plaintiff had failed to meet his burden of proof. We find nothing in the record of this case which would justify our setting aside the verdict of the jury and granting the plaintiff a new trial.

Plaintiff now moves for a new trial on the basis of newly discovered evidence under the provisions of F. R. C. P. Rule 60 which grants discretion to the Court to relieve a party from a final judgment where there is newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). The newly discovered evidence consists of a witness who appeared before plaintiff's counsel after news of the verdict had been published, whose existence was not known before and who gave a statement concerning the condition of the snow on the slope of ground surrounding the railroad track here. Ac-

cording to this witness the efforts of the railroad in using torches and blowers to melt the ice and snow underneath the derailed locomotive had caused the snow on the slope adjoining the locomotive to thaw. In the sub-freezing temperature this thawed snow later froze and created a large patch of smooth ice over the entire surrounding slope and adjacent area. Therefore, plaintiff argues that it now has evidence that the icy condition under foot was an artificial condition created by the railroad, which it allowed to exist for a sufficient time to have notice and an opportunity to make the condition safe. This new witness would also testify that while plaintiff was at the top of the slope, just before he fell, he came into bodily contact with Mr. Ritter, the railroad foreman.

We have serious doubts as to whether or not this is properly classified as newly discovered evidence which by due diligence could not have been discovered prior to the trial. The plaintiff was aware that another crew had been working at this area prior to the arrival of his crew. They were there when he arrived. Plaintiff only called as witnesses the members of his own crew. But more important than this is the obvious fact that the plaintiff and the three members of his crew who walked together with him over this same stretch of ground had a full and ample opportunity to describe the condition of the ground at the point where plaintiff fell. Plaintiff testified that he fell on ice, that it was an icy condition where he fell. The other witnesses described the ground in much the same terms.

In this sense the testimony of the new witness could only be cumulative. The duty of the railroad to provide

a safe place to work is an affirmative non-delegable duty, and is not changed by these circumstances. Nor do we find that the possible testimony that plaintiff was touched or jostled before he fell adds anything new to the circumstances. The plaintiff had a full opportunity to explain the circumstances on the witness stand and the plaintiff was questioned on deposition as to this possibility.

The plaintiff neither took exception to the instructions of the Court, nor submitted any request to charge. We believe that the charge was adequate.

We can find nothing in this case to justify our setting aside the jury's verdict and granting a new trial after what we considered to have been a full and fair trial of the issues in this case.

Order

AND NOW March 16, 1966, plaintiff's motion for a new trial is hereby DENIED.

GERALD J. WEBER,
United States District Judge.

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OPINION OF THE DISTRICT COURT ON THE MOTION FOR A NEW TRIAL UNDER RULE 60 (b) (2)

Opinion.

(Filed August 30, 1966.)

WEBER, J. August 30, 1966.

The Court now has before it two motions by the plaintiff, a motion for a hearing and new trial for the reason of newly discovered evidence under Rule 60 (b) (2), and a motion for relief from denial of a new trial under Rule 60 (b) (6). A previous motion for new trial timely filed after the verdict was denied by this Court in its opinion of March 16, 1966. Much of the argument in plaintiff's brief on his motion for new trial was devoted to the newly discovered evidence issue which is now being raised again by the brief and argument under the present motion presented under Rule 60 (b) (2). We find nothing new in this argument which would cause us to depart from the opinion rendered on March 16, 1966. In view of the nature of plaintiff's evidence at the trial we have serious doubt that the alleged newly discovered evidence, if presented to the jury, would have produced a different result. The duty of the defendant would have been the same, the requirement of care to be exercised by the plaintiff would have been the same, and the issue as to the nature and extent of plaintiff's injuries would have been the same. The motion for relief based on newly discovered evidence will be denied.

With respect to the motion for relief under Rule 60 (b) (6), which covers "any other reason justifying re-

lief from the operation of the judgment", the Court feels that plaintiff's counsel in its brief is not being entirely fair to the Court. The verdict was rendered January 28, 1966. A Motion for New Trial was filed by plaintiff on February 4, 1966, which recited ten reasons for the granting of a new trial, eight of them being specific averments of error. The Court, on February 8, 1966, issued an order for argument on the matter to be held March 2, 1966, requiring the moving party's brief to be filed by February 20, 1966, and the responding party's brief on February 25, 1966. No brief was filed by the moving party, but responding party's brief was received by the Court on February 24, 1966. At 10 a. m., on March 2, 1966, the time and date scheduled for the argument, defendant's counsel appeared but not plaintiff's. Later the same date the Court received a letter from plaintiff's counsel reciting that defendant's counsel had alerted him on his failure to file his brief and stating that he required a transcript of the trial to prepare a proper brief. Enclosed was a motion to extend the time for brief until counsel had an opportunity to review the record. There had been no prior notice or request for continuance or extension of time from plaintiff's counsel. Nevertheless, the Court, on March 3, 1966, filed a Memorandum Order allowing plaintiff until March 7, 1966, to file a brief on the motion which was duly filed and considered in the opinion of March 16, 1966, in which the motion was denied. The Court saw no need for having a transcript of the trial prepared because the Court's recollection of the evidence at that time was fresh and the Court had the advantage of its own notes. Counsel had access to that portion of the transcript containing plaintiff's testimony which was filed February

24, 1966, and the Court has never been shown any compelling reason for reference to a transcript.

The Court does not wish to deal harshly with counsel because of any excusable delays or omissions. The Court feels that the plaintiff had a full, fair and complete trial on all of the issues. The matter was submitted to the jury under a charge to which no exception was taken, and which the Court, upon review, finds free of fundamental error. We have reviewed our opinion of March 16, 1966 and we find nothing in the present motions that would cause us to change the conclusions arrived at therein.

Order

AND NOW this 30th day of August, 1966, plaintiff's motions for:

1. Hearing and New Trial for the Reason of Newly Discovered Evidence Under Rule 60 (b) (2); and
2. For Relief from Denial of a New Trial under Rule 60 (b) (6)

are DENIED.

s/ GERALD J. WEBER,
United States District Judge

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16207

JOHN J. PLISCO,

Appellant,

v.

UNION RAILROAD COMPANY, a Corporation.

Appeal From the United States District Court for the Western District of Pennsylvania

---

Argued March 10, 1967

Before: MCLAUGHLIN, HASTIE and FREEDMAN, *Circuit Judges.*

Opinion of the Court

(Filed June 15, 1967)

By HASTIE, *Circuit Judge.*

This is an action by a railroad employee against his employer for personal injuries suffered by the plaintiff when, during the course of his work, he slipped and fell on an icy slope. A jury trial resulted in a verdict and judgment for the defendant. Several months after the judgment had become final the plaintiff filed the present motion for a new trial under Rule 60(b) alleging that newly discovered evidence warranted such post judg-

ment relief. After hearing, the trial court denied the motion. This appeal followed.

The accident occurred in freezing weather at a time when the plaintiff was assisting in rerailing a derailed engine. The snow near the engine was hard-packed and the plaintiff fell at a point where the surface was very slippery. A major issue in the case was whether the railroad had used reasonable care to provide the plaintiff a safe place to work.

The alleged newly discovered evidence was the testimony of Thomas Askey, another railroad employee but not a member of the plaintiff's crew, to the effect that before the plaintiff's accident blowtorches used by railroad employees near the derailed engine had caused a considerable melting of snow in the area. And because of the low temperature this melted snow quickly refroze, creating an icy surface.

It is arguable that this evidence that the hazardous walking and working conditions had been caused by abnormal and perhaps unnecessary conduct of railroad employees might have persuaded a jury that the railroad had not used reasonable care to provide the plaintiff a safe place in which to work. Thus, this additional evidence might have changed the result of the trial.

But more than a showing of the potential significance of the new evidence is necessary to justify the granting of a new trial after judgment has become final. Our concern here is with extraordinary relief which should be granted only where extraordinary justifying circumstances are present. More particularly, it must appear that reasonable diligence by the movant before

trial would not have brought to light the evidence which he failed to discover until after trial. *Fleet v. W. A. Alexander & Co.*, 7th Cir., 1962, 302 F.2d 321, *cert denied* 371 U.S. 841; *Hartford Accident and Indemnity Co. v. Shaw,* 8th Cir., 1959, 273 F.2d 133. In this connection this court has said that newly discovered evidence within the meaning of Rule 60(b)(2) is evidence "of which the aggrieved party was excusably ignorant" at the time of trial. *Brown v. Pennsylvania R.R. Co.*, 1960, 282 F.2d 522, 526-7, *cert. denied* 365 U.S. 818. Indeed, Rule 60(b)(2) is in terms geared to the provisions of Rule 59 regulating new trial motions before judgment becomes final and thus covers only that new evidence "which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)".

The above stated legal considerations are controlling here. The appellant knew that fellow employees who were members of crews other than his own were working at the scene before he arrived and when he was injured. Indeed, he so stated in his answer to pretrial interrogatories. The appellant also testified in support of his motion for a new trial that he saw a "crew from Monongahela Junction"—the crew to which the would-be supplier of "newly discovered evidence" belonged—at the scene of the accident, but was unaware that they witnessed the accident.

But most significant of all is the affidavit of Thomas Askey, the new witness whose prospective testimony is said to justify a new trial. Beyond deposing that the icy condition was created artificially by railroad employees using blowtorches, Askey also asserted that he spoke to the appellant about the accident two

or three times before the trial and that "certainly I let him know that I had witnessed the accident, and that I was on the premises . . . when it occurred". Thus the very witness whose evidence the appellant calls "newly discovered" within the meaning of Rule 60(b) has effectively refuted that legal characterization. The appellant cannot rely upon the helpful part of the statement of his proffered witness and expect the court to disregard the adverse remainder.

We find no escape from the conclusion that, after Askey identified himself to the appellant before trial as an eye witness, reasonable diligence on the appellant's part would have included questioning Askey to discover whatever information he possessed that was relevant to the disputed claim. It follows that any deficiency in the appellant's proof at trial was the result of this lack of diligence on his part. Therefore, he is not entitled to have an adverse final judgment reopened to permit an unjustifiably tardy supplementation of his case.

The appellant also invokes the general provision of Rule 60(b)(6) authorizing relief from a final judgment for "any other reason justifying relief". However, this case presents no substantial basis for seeking relief other than the desire to supplement the record with Askey's testimony. The appellant's case is no stronger under clause (6) of Rule 60(b) than under clause (2).

One or two additional comments seem appropriate, if to some extent repetitive, in the light of the dissenting opinion. That opinion stresses the fact that the appellant was unaware that Askey had important information about the circumstances of the accident which was unknown to the appellant. However, we think that

is not the crucial point. The appellant did know that Askey was on the scene when the appellant arrived and that Askey witnessed the accident. The decisive fact is that the appellant failed to question Askey to discover what he had observed that might be helpful. It is this failure to inquiry what information a known witness could supply which prevents Askey's testimony from being such newly discovered evidence as would warrant reopening a final judgment.

Finally, it is to be emphasized that this is not a motion filed within ten days after judgment. It is a request for relief filed long after judgment had become final. One who seeks such extraordinary relief from a final judgment bears a heavy burden. In the circumstances of this case the court acted well within its discretion in denying such relief.

The judgment will be affirmed.

McLAUGHLIN, *Circuit Judge,* dissenting.

It is conceded that the new evidence could change the trial result. It follows that the lower court seriously erred in denying plaintiff's motions because while the Court noted that "* * * plaintiff was aware another crew had been working at this scene prior to the arrival of his crew" and that "Plaintiff only called as witnesses the members of his own crew.", the Court in denying the motion relied upon the theory that plaintiff and his crew at the trial "* * * had a full and ample opportunity to describe the condition of the ground at the point where plaintiff fell. What the Court utterly failed to take into account was that plaintiff and his witnesses thought the icy, etc. condition of the ground was natural. They had no idea that it may very well have been created artificially by the railroad's action in melting the snow which in turn froze into the resultant ice.

The trial judge considered the matter both under plaintiff's motion for a new trial on the ground that the verdict was against the weight of the evidence and under Rule 60(b), based on the newly discovered evidence. He denied the 60(b) motion squarely on his mistaken theory that the new evidence would not have produced a different result. His thought regarding this was as stated in his opinion on the motions for a new trial:

> "Plaintiff testified that he fell on ice, that it was an icy condition where he fell. The other witnesses describe the ground in much the same terms.
>
> "In this sense the testimony of the new witness could only be cumulative. The duty of the railroad to provide a safe place to work is an affirmative

nondelegable duty, and is not changed by these cirstances."

The majority opinion relies wholly upon the proposition that the new evidence could have and should have been discovered through reasonable diligence by trial time. I do not think the record justifies that finding.

Very briefly, on the afternoon of December 12, 1962, there was a derailed locomotive of defendant railroad on property of Continental Can Co., near the Monongahela Junction Yard of the railroad which is in the Pittsburgh, Pennsylvania area. The temperature at the time was twelve degrees above zero. Plaintiff was a fireman for the defendant. He and four other employees went to where the engine was to help move it. The ground around the engine was covered with shiny, packed snow and ice. Plaintiff had to go down a slope and in so doing slipped, fell and was hurt. Suit was commenced on his behalf. Plaintiff's interrogatories to the railroad, filed April 20, 1964, had as their first question the following:

"1. State the names and addresses of all witnesses or persons who have knowledge of the accident complained of and list them as follows:

a) Witnesses who have knowledge of facts and events immediately preceding the accident;

b) Eyewitnesses to the accident;

c) Witnesses who have knowledge of facts or events immediately subsequent to the accident."

The railroad answered this giving only the names of the men with plaintiff and nothing else.

The case was tried on the understanding that the ground was covered with natural ice, etc. There was a verdict in favor of the defendant. Sometime after the trial on February 1, 1966, a report of plaintiff losing his claim appeared in the railroad newsletter. Numerous railroad employees telephoned plaintiff's attorney about this. The attorney had a meeting with those men at which time he learned that another railroad crew had been on the scene earlier and to quote him "I further learned that the icy condition which caused my client's fall was artifically created by railroad employees with the railroad's knowledge." Thomas C. Askey, a brakeman with that first crew, made an affidavit which inter alia told how that crew had used a flame thrower in and around the vicinity of the derailed engine to loosen it from "* * * the ice and snow on the ground which was frozen solid." He described how the instrument was operated by the men walking back and fourth, etc. and that as they moved away from the melted spot it would freeze up immediately. He said this created a sheet of ice on the slope to the left of the engine about 20 by 60 feet and that was where plaintiff fell. He said that after he had seen the story in the railroad paper he called plaintiff's attorney and asked him if any of his crew had testified and that the attorney said "* * * he did not know of these men and had not been given their names." "I then offered to give this affidavit since I felt that very important facts were missing from the trial testimony." *His affidavit does not mention one word about ever telling plaintiff he was a witness to the ac-*

cident. That story in fact comes from one Finley who describes himself as "Chief Claim Agent for the Union Railroad Company". After plaintiff's attorney filed the Askey affidavit, Finley had Askey come to his office. There he interrogated Askey for twenty-eight pages of the printed appendix, allegedly using some sort of a recording device. His main effort throughout that questioning was to have Askey say that he specifically told plaintiff he was a witness to the latter's accident. After twelve pages, Finley got around to asking "Did you ever talk to Mr. Plisco about this accident?" Askey said he did on a number of occasions that "I mentioned it to him before trial and he knew I was present." On the next page Askey said he "* * * talked with plaintiff at work twice possibly 3 times about the accident." He was interested in how plaintiff felt and sitting with him "Brought up a recollection of this event." Finley asked Askey if he had ever talked with an investigator from the office of plaintiff's attorney and Askey told him "No, sir." Finley asked "Well, did you tell him that you would be a witness for him?" Askey answered "I don't remember ever volunteering that." Finley asked "What made you volunteer in 1966? A. In 1966 Union Railroad published a Management Newsletter in which they said that. Q. Mr. Plisco had lost his case? A. Yes. Words to that effect." According to Mr. Askey, that news "seemed to have excited a lot of talk among the men." Askey talked with the representative of the Brotherhood of Locomotive Engineers and went with him to the attorney's office. As Askey said, "And that was how I came to see Mr. Hickton [plaintiff's attorney]." From Mr. Hickton, Askey found out there had been no mention of the work of the Maintenance of Way

men, the people who used the flame throwers. Askey said "And when we had talked about these things, I volunteered the information that I have in this, that he put into this affidavit which I have signed." Finley continued to try and have Askey say he categorically told him "that you were a witness in this accident?" Askey said "I thought Mr. Plisco was perfectly aware that I was there, and." "Q. But you told him? I think you told me earlier on the record you told him at least 2 or 3 times? Is that correct? A. I think I, I think I told you that, yes, sir. But I didn't come out and say, 'John, I was a witness to your accident.'" Again Askey said "But I never emphasized it because it was my assumption that he knew these things." Finley asked him questions about what the lawyer had said to him. Askey said the lawyer had told him things about the trial but he didn't remember what they were. Finley said:

> "Q. Well he must have. He must have indicated to you that some testimony you had would be different than anybody else had said. Did he indicate that?
>
> A. Yes, he did.
>
> Q. What was that all about? What did he indicate there?
>
> A. The fact that the mobile unit never been mentioned. The torches had never been mentioned. The frigid temperature, I think. Because he questioned me somewhat along the lines you have about this iced condition and what caused it. *The only explanation I had for it. I think the true explanation was that the torches were responsible.*" (Emphasis supplied).

Throughout all of the twenty-eight pages of questions, Finley never once asked Ashley if the latter ever told plaintiff that the first railroad maintenance squad had used a flame thrower which had caused the ice on which plaintiff had slipped.

The above gives the simple, uncontradicted and in truth uncontradictable, answer to the failure to have Askey and the other first crew members at the trial. Plaintiff never had the slightest idea that they knew any more or anything different than he and his men knew. Askey makes a magnificent, straightforward showing under that long pressure badgering by his employer's chief claim agent. Askey had mistakenly assumed Plisco knew everything that he did of the conditions at the time of the accident and therefore never intruded with the special knowledge he possessed. The railroad never mentioned Askey or that first crew as witnesses or anything about the flame thrower either in the answers to interrogatories or in the defense pretrial statement. Absent the unknown flame thrower information, Askey and the first unit would have been undoubtedly merely cumulative witnesses and of no importance. There is nothing in the record giving the slightest intimation of what now develops as the vital part of the claim on its merits. Plaintiff's attorneys are not amateurs; they are top trial lawyers. And with the railroad stating that the only witnesses were with the plaintiff, with no suggestion whatsoever of the unusual additional element of what was seemingly an ordinary snow and ice situation, there was nothing in the suit that warrants plaintiff's attorneys being characterized as so lacking in reasonable diligence as to deny a trial of this case on its plainly substantial merits. Plaintiff

has been the victim of an unfortunate mischance, it is nothing else. This honest cause of action as it stands has every right to be fairly heard.

There was no finding whatsoever by the trial judge that plaintiff and his attorneys were lacking in diligence by not having Mr. Askey and his first crew associates as witnesses. The denial of the new trial as has been above quoted was solely because the judge held that the new evidence would be cumulative. As is admitted, the new evidence was not cumulative but new in all respects. It completely changed the cause of action. It showed that the active, proximate negligence which created the slippery condition and brought about plaintiff's fall was the direct, immediate responsibility of the defendant railroad. The denial of plaintiff's motion was clearly wrong as a matter of law.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.